

1 CRAIG WILKE (150728)
craig@craigwilkelaw.com
2 305 North Harbor Boulevard, Suite 216
Fullerton, California 92832-1901
3 Telephone (714) 870-8900
Facsimile (714) 879-2278

4 Attorney for Defendant
5 ALLEN JOHNSON

6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA,)
12 Plaintiff-Respondent,)
13 v.)
14 ALLEN JOHNSON,)
15 Defendant-Movant.)
16

NO. SA CV 10-1641-JVS
SA CR 05-36-JVS

**SUPPLEMENTAL
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
VACATE SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

17 Defendant-Movant Allen Johnson, by and through his attorney of record, Craig
18 Wilke, hereby files a supplemental memorandum of points and authorities in support
19 of his motion to vacate his sentence pursuant to 28 U.S.C. § 2255 which addresses
20 the recent Ninth Circuit decision in *United States v. Garrido*, 713 F.3d 985 (9th Cir.
21 2013).

22 Respectfully Submitted,

23 Dated: June 10, 2013

24 /s/
CRAIG WILKE
Attorney for Defendant-Movant
Allen Johnson

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

On October 26, 2010, Defendant-Movant Allen Johnson filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 claiming that the United States Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), which limited the reach of "honest services" fraud under 18 U.S.C. § 1346 to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived," *id.* at 2928, rendered the conduct to which he pleaded guilty no longer criminal. *See* Mot. at 2. The government filed its opposition on December 3, 2010; Johnson filed his reply on January 7, 2011; and the matter has been under submission to the Court for the past two and one-half years. On April 15, 2013, the Ninth Circuit issued an opinion in *United States v. Garrido*, 713 F.3d 985 (9th Cir. 2013), which, as discussed below, is directly on point to the issues in this case.

In *Garrido*, the defendants Robles and Garrido were convicted following a jury trial of multiple counts of "honest services" fraud. *Id.* at 988. While on appeal, the Supreme Court issued its opinion in *Skilling* which, in the words of the Ninth Circuit, "narrowed the scope of 18 U.S.C. § 1346 to include only honest services fraud based on bribery and kickback schemes" and "prohibited prosecutions . . . based on a *failure to disclose a conflict of interest* as unconstitutionally vague." *Id.* (citing *Skilling*, 130 S. Ct. at 2932-33). Although the indictment and jury instructions encompassed a bribery and kickback scheme, *id.* at 996, and the evidence supported the conviction under this theory, *id.* at 997, the court found plain error "because the . . . instructions permitted the jury to convict . . . on *Skilling's* now unconstitutional failure to disclose theory" *Id.* at 995. The court also reversed Robles' money laundering convictions which required proof of a "monetary transaction in criminally derived property," noting that the indictment alleged that the "criminally derived property" was money derived from Robles' honest services fraud . . . [and] because

/

1 the § 1346 honest services convictions were constitutionally defective under *Skilling*,
2 so too were the [money laundering] convictions.” *Id.* at 998-99.

3 In light of *Garrido*’s interpretation of *Skilling*, there is no reasonable dispute
4 that the conduct to which Johnson pleaded guilty is no longer criminal. The
5 indictment in *Garrido* “could be read to at least imply a bribery or kickback scheme.”
6 *Id.* at 996; *see also id.* at 989 n.1 (indictment alleged that co-schemer received over
7 \$2 million from city contracts and, in turn, paid over \$1.4 million to Robles’ family
8 and friends). The jury instructions in *Garrido* referred to bribery and kickbacks as
9 “example[s] of schemes that could amount to honest services fraud” *Id.* at 996.
10 The evidence in *Garrido* supported a conviction under and bribery or kickback
11 theory as a co-schemer testified that Robles instructed him to funnel more than half
12 the proceeds from a municipal contract to Robles’ relative, *id.* at 997, and the Ninth
13 Circuit found sufficient evidence to affirm Robles’ conviction on five bribery counts
14 based on this conduct, *id.* at 999-1002. Nonetheless, the court reversed the
15 defendants’ honest services fraud convictions after concluding that there was a
16 “reasonable probability that the jury convicted [them] of honest services fraud based
17 on their failure to disclose a conflict of interest,” *id.* at 995-96, and acquitted the
18 defendants of the honest services fraud counts where it was undisputed that the
19 theory under which they were convicted was an undisclosed self-dealing theory, *id.* at
20 999.

21 In this case, Johnson pleaded guilty to six counts of honest services fraud
22 based on a theory that, in acting as a closing agent for home purchase and equity
23 loans, he defrauded lenders (to whom he had a fiduciary obligation) of their right to
24 his honest services by disbursing loan proceeds to the loan originator (*i.e.*,
25 codefendant Kenneth Ketner) rather than directly to the borrower while also paying
26 the loan originator a portion of the fees he received as the closing agent and
27 disguising these payments. *See* Memo. of P.&A. at 2-4 (filed Aug. 25, 2010).
28 Johnson was never charged with and never admitted to defrauding lenders to whom

1 he had a fiduciary obligation of their right to his honest services by accepting a bribe
 2 or kickback. *See* Indictment (Ex. A to Mot.) at 1-2, 9-17; Plea Agreement (Ex. B to
 3 Mot.) at 4-7; Transcript of Guilty Plea Hearing (Ex. C to Mot.) at 22-30. As there has
 4 never been any allegation or admission that Johnson defrauded lenders of their right
 5 to his honest services by accepting a bribe or kickback,¹ the Ninth Circuit's opinion
 6 in *Garrido* provides additional authority for Johnson's claim that the conduct
 7 underlying his conviction is not the type of bribery or kickback scheme to which
 8 *Skilling* narrowed the scope of honest services fraud. *Garrido* also supports
 9 Johnson's claim that his money laundering conspiracy conviction should be vacated
 10 because the monetary transactions contemplated by the conspiracy to which he
 11 pleaded guilty did not involve criminally-derived property.

12 Respectfully Submitted,

13 Dated: June 10, 2013

14 /s/
 15 CRAIG WILKE
 16 Attorney for Defendant-Movant
 17 Allen Johnson
 18
 19
 20
 21
 22
 23
 24

25 ¹ The indictment's allegation that Johnson "provided a portion of the
 26 closing fee to defendant KETNER as a kickback," Indictment (Ex. A to Mot.) at 11,
 27 ¶ 16(h), is not sufficient for a post-*Skilling* honest services fraud charge because there
 28 was no allegation that Ketner had a fiduciary duty to the victim lenders. *See United*
States v. Milovnovic, 678 F.3d 713, 722-24 (9th Cir. 2012) (en banc) (*Skilling*
 requires breach of fiduciary-type duty as element of "honest services" fraud); *see also*
 Reply at 10-11.